68

(9) No. 07-395
(Application No. 07A252)

FILED
SEP 25 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

THOMAS D. ARTHUR,

Petitioner,

—*v.*—

RICHARD F. ALLEN,
Commissioner, Alabama Department of Corrections, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF IN FURTHER SUPPORT OF HIS PETITION FOR A WRIT OF CERTIORARI AND MOTION FOR A STAY

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September 25, 2007

In light of the fact that this Court granted a writ of certiorari today in *Baze* v. *Rees*, 07-5439, Petitioner Thomas Douglas Arthur files this Supplemental Brief in Further Support of his Petition for a Writ of Certiorari and Motion for a Stay of Execution.

ARGUMENT

This morning, the Supreme Court granted a writ of certiorari to the Kentucky Supreme Court in *Baze* v. *Rees*, 07-5439, to address the important constitutional questions raised in the petition for a writ, including, among others, the proper standard for determining whether a method of execution violates the Eighth Amendment to the United States Constitution. The answers to these questions could drastically change the procedures by which death-sentenced inmates are executed by lethal injection in the 37 states that currently use this method. Because the three-drug cocktail at issue in *Baze* v. *Rees* in Kentucky is identical to the three drug cocktail that Mr. Arthur understands is used in Alabama, this Court should grant Mr. Arthur's Petition for a Writ of Certiorari, as well as his Motion for a Stay of Execution pending this Court's decision regarding the proper standard for determining the constitutionality of lethal injection.

I. The Equities Militate in Favor of a Stay

The issues at stake here are unquestionably important to Mr. Arthur, who stands to be executed pursuant to a protocol that he believes will result in an excruciatingly painful death – as confirmed by numerous courts. *See, e.g.*, *Harbison* v. *Little*, No.

3:06-CV-01206 (M.D. Tenn. Sept. 19, 2007) (finding Tennessee's lethal injection protocol in violation of the Eighth Amendment); *Morales* v. *Hickman*, 415 F. Supp. 2d 1037, 1046-48 (N.D. Cal. 2006). Not since 1879 has this Court addressed on the merits a constitutional test over a method of execution. *See Wilkerson* v. *Utah*, 99 U.S. 130 (1878) (execution by firing squad is not unconstitutional). The number of lethal injection challenges percolating in the state and federal courts across the country demonstrates the real need for this Court to provide some guidance on the appropriate standard of review. Until this Court answers the questions presented in *Baze* v. *Rees* and determines the constitutionality of a particular means for effecting the ultimate punishment, it is unconscionable for states to continue with executions by lethal injection.

Although the Kentucky Supreme Court held that Kentucky's lethal injection procedure, which is apparently identical to Alabama's, does pass muster under the Eighth Amendment to the United States Constitution, this Court's clarification of the appropriate standard of review could alter that holding, as well as many other similar holdings around the country. *See, e.g.*, *Walker* v. *Johnson*, 448 F. Supp. 2d 719, 723 (E.D. Va. 2006). Executing Mr. Arthur two days after this Court granted certiorari in *Baze* v. *Rees* and one week before the issue of the constitutionality of Alabama's lethal injection protocol proceeds to trial in the United States District Court for the Middle District of Alabama flies in the face of both fairness and common sense. Without a stay, if this Court – or the Alabama district court – were to determine that

lethal injection as practiced around the country or in Alabama is unconstitutional, Mr. Arthur will have been executed in violation of the Eighth Amendment. There is no clearer example of irreparable harm. It is only through a stay that Mr. Arthur can be afforded the protections this Court may determine are required under the United States Constitution.

II. Mr. Arthur's Claim Has a Strong Likelihood of Success on the Merits

Mr. Arthur has demonstrated – and can demonstrate further with discovery – a strong likelihood that Alabama's lethal injection protocol requires modifications in order to pass constitutional muster. As set forth in Mr. Arthur's Petition, courts around the nation have granted a variety of forms of relief on similar claims brought by death row inmates, and this Court's grant of certiorari in *Baze* v. *Rees* will provide much needed guidance for future decisions. As also set forth in Mr. Arthur's Petition, lethal injection is currently or was previously suspended in California, Delaware, Florida, Maryland, Missouri, North Carolina, South Dakota and Tennessee. With appropriate guidance from this Court, Mr. Arthur and other similarly situated petitioners, will not only be able to demonstrate that lethal injection as practiced in Alabama and in other states is unconstitutional, but with the help of experts, they will be able to prescribe painless methods of execution that will meet minimum constitutional standards.

CONCLUSION

Based on the additional development of this Court's grant of a writ of certiorari in *Baze* v. *Rees*, along with the reasons expressed in Mr. Arthur's Petition for a Writ of Certiorari, Mr. Arthur respectfully urges this Court to grant his Petition and his Motion for Stay of Execution.

Respectfully submitted,

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